

**H. B. Zachry Company and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.**  
Cases 12-CA-14962(1-2) and 12-CA-15018

April 7, 1993

DECISION AND ORDER

BY CHAIRMAN STEVENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On November 27, 1992, the Regional Director for Region 12 issued an order consolidating cases, consolidated complaint and notice of hearing in the above proceeding alleging, inter alia, that the Respondent violated Section 8(a)(3) of the Act by refusing to hire 18 individuals based on their affiliation with the Union, by discharging 2 other employees and by refusing to rehire an employee based on their union activities.

Prior to the hearing, the Respondent served on the Union identical subpoenas duces tecum seeking a variety of documents. Paragraph 7 of each subpoena covers, inter alia, affidavits reflecting communications between any agent of the Union and any of the 21 alleged discriminatees. Paragraph 7, by its terms, would include such affidavits, even if they were taken by the General Counsel in his investigation of the case. Respondent appears to concede that such affidavits, if solely within the possession of the General Counsel, would not be subject to production until after an affiant testifies as a witness for the General Counsel or the Charging Party. However, because copies of these affidavits were given to the Union by the affiants, Respondent contends that it is entitled to these documents, even if the affiants do not testify.

The General Counsel and the Charging Party seek to revoke paragraph 7 insofar as it covers affidavits taken by the General Counsel, even if copies thereof were given by the affiant to the Union.

On March 8, 1993, the hearing opened before Administrative Law Judge Philip McLeod. Judge McLeod recognized that requiring the Union to turn over the affidavits taken during the investigation violated the *Jencks* rule "in spirit if not in its letter" and that requiring production at the start of the hearing would violate *Jencks*, "but as a matter of law I think the affiants had waived their right to the more complete privacy that they might be accorded had they not turned over voluntarily copies of their own affidavits to the union."<sup>1</sup> Judge McLeod concluded that the Union must turn over the affidavits at the close of the General Counsel's case-in-chief including "affidavits in the union's possession of witnesses who have nei-

ther been called by the General Counsel in its case, nor intend to be called by the Charging Party in its case."<sup>2</sup>

On March 17 and 18, 1993, respectively, the Charging Party and the General Counsel each filed a request for special permission to appeal from the judge's ruling.<sup>3</sup> The Charging Party and the General Counsel contend that, under *Jencks*, statements taken during an investigation must be produced, but only after the affiant has appeared and testified at a hearing; that the rule provides a respondent's counsel with an opportunity to review pretrial statements for purposes of cross-examination; and that the present rule provides the Respondent with an opportunity to defend itself while protecting a potential witness' limited right to confidentiality in regard to statements given during the investigatory stage of a charge. Further, the Charging Party and the General Counsel argue that the Respondent seeks to obtain through the Union what is clearly not available to it under the Board's Rules and policy, that the argument that the Board's Rule applies only to affidavits in possession of the General Counsel elevates form over substance, and that to give the Respondent access to Board affidavits in possession of any party "subverts the spirit and policy underlying the rule." Accordingly, the Charging Party and the General Counsel move the Board to grant their appeals, reverse the judge, and direct the judge to quash the Respondent's subpoenas to the extent they require the Union to turn over the affidavits of individuals who have not testified and will not be called as witnesses.

On March 24, 1993, the Respondent filed opposition to the Charging Party's and the General Counsel's appeals. Citing *Martin v. Ronnigen Research & Development Co.*, 1 Wage & Hour Cas. 2d (BNA) 176, 1992, Westlaw 409936 (W.D. Mich. 1992), the Respondent contends that in that case the court found that "[w]here an employee's statements have already been released by the Secretary [of Labor] or where an employee has already been deposed without objection about his or her statements and witnesses with the compliance officer, the [*Jencks*] privilege, of course, has been waived as to that employee." Accordingly, the Respondent urges the Board to affirm the administrative law judge's ruling that the individuals have

<sup>2</sup>Only three of the alleged discriminatees testified at the hearing in support of the General Counsel's case-in-chief, and the affidavits of those individuals were turned over to the Respondent's counsel for purposes of cross-examination. The remaining affidavits subject to the subpoenas were from job applicants who had not been hired and who did not testify at the hearing.

<sup>3</sup>By an unpublished Board Order dated March 26, 1993, the parties were advised that the Charging Party's and the General Counsel's requests for special permission to appeal had been granted and that a fully articulated decision would follow.

<sup>1</sup>In addition to waiver, the judge concluded that the Respondent is entitled to the affidavits, "so that they might be used by Respondent in preparing its defense."

waived any right of confidentiality which might otherwise attach to their statements.

Having duly considered the matter, the Board has decided to grant the requests for special permission to appeal and to reverse the judge. Section 102.118(b)(1) of the Rules requires that an affidavit be supplied only after a witness has testified. Concededly, Section 102.118(b)(1) speaks of affidavits “in the possession of the General Counsel.” The affidavits here are in the possession of the General Counsel *and the Union*, and the subpoenas are directed to the Union. However, Section 102.118(b)(1) is not limited to situations where the affidavits are *exclusively* in the possession of the General Counsel. In addition, as a practical matter, the Union, as the Charging Party, has a legitimate interest in asking employees for copies of affidavits given by them to the General Counsel during investigation of the case. Under Respondent’s contention, if the employee complies with the request, the protections of confidentiality would be lost. Based on the policy considerations set forth in *Robbins Tire*,<sup>4</sup> the Board will not require the production of the affidavit simply be-

cause the affiant gave a copy of it to the Charging Party Union.<sup>5</sup>

#### ORDER

It is ordered that the Charging Party’s and the General Counsel’s requests for special permission to appeal the judge’s ruling are granted and the administrative law judge is reversed.

IT IS FURTHER ORDERED that the above proceeding is remanded to Administrative Law Judge Philip McLeod, with instructions to quash paragraph 7 of the subpoenas to the extent that they seek the production of statements from individuals who were not called to testify.

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<sup>5</sup>The Respondent also argues that an employee, by giving a copy of the affidavit to the Charging Party Union, waives his/her rights to confidentiality. We disagree. The mere fact that an employee gives a copy of an affidavit to the Charging Party does not establish, clearly and unmistakably, that the employee has consented to release the affidavit to the opposing side.

*Martin v. Ronnigen Research & Development Co.*, supra, relied on by the Respondent is distinguishable in that the witness’ affidavits were released by the Secretary of Labor (the counterpart to the General Counsel in the instant case). That is not the situation here. Indeed, the Respondent concedes that the affidavits are not available to it from the General Counsel.

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<sup>4</sup>*NLRB v. Robbins Tire Co.*, 437 U.S. 214 (1978).